RECORD AND BRIEFS

No. 15-214

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IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN AND
ST. CROIX COUNTY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

BRIEF OF *AMICI CURIAE* CALIFORNIA CATTLEMEN'S ASSOCIATION, AMERICAN FARM BUREAU FEDERATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae, the California Cattlemen's Association, the American Farm Bureau Federation, and the National Federation of Independent Business Small Business Legal Center, submit this brief in support of petitioners Joseph P. Murr, et al. ("Petitioners").

The California Cattlemen's Association ("CCA") is the preeminent organization of cattle grazers in California, and acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interests of the livestock industry. Formed in 1917 as a non-profit trade association, the CCA promotes the interests of ranchers both large and small in California. The CCA has 35 local cattlemen's association affiliates that serve as a strong link between the grassroots membership and the association. The CCA represents its members' interests before the California State Legislature, Congress and federal and state regulatory agencies on a wide range of issues including federal lands grazing fees and regulation, wetlands, conservation programs, air quality, wildlife management, parcel fees, and other issues affecting the use and ownership of California's rangelands.

California is the third largest state in the union with almost 105 million acres of property. At 57 million acres, primary rangelands—meaning those lands suitable for the

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1. The parties have consented to the filing of this brief. No counsel for a party authorized this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

grazing of livestock—make up nearly 57% of California. CAL. DEP'T OF FORESTRY & FIRE PROT., CALIFORNIA'S FORESTS AND RANGELANDS: 2010 ASSESSMENT 53 (2010). Forty-three percent of these 57 million acres are in private ownership. CAL. DEP'T OF FORESTRY & FIRE PROT., CALIFORNIA'S FORESTS AND RANGELANDS: 2003 ASSESSMENT 67 (2003).

Owners of private rangeland are required to navigate the land use laws applicable to ranches that often consist of large-scale acreages sometimes stretching across multiple jurisdictions. These rangelands are typically held for the purposes of a family business and have been in the same family-operation for four or five generations. *See* Shasta Ferranto et al., *Forest and Rangeland Owners Value Land for Natural Amenities and As Financial Investment*, 65 CAL. AG. 184 (2011). For many ranches, the parcels have been acquired piecemeal over decades. STEPHANIE LARSON-PRAPLAN, CAL. RANGELANDS RESEARCH & INFO. CTR., HISTORY OF RANGELAND MANAGEMENT (2015). While there may be common ownership among these parcels, the individual holdings have been acquired separately and are often noncontiguous. Particularly in mountain areas, a rancher's deeded land may be interspersed with other leased lands; loss of one key parcel may affect the operational functionality of a large area. Inconsistency in land use law and the "takings" doctrine, especially the "parcel as a whole" question, creates a minefield for these private landowners as well as uncertainty for local land use regulators when faced with such large property holdings.

America's farmers own farmland in a manner similar to California's ranchers. The American Farm

Bureau Federation ("AFBF"), is an independent, non-governmental voluntary organization governed by and representing farm and ranch families nationwide. AFBF was formed in 1919 and has member organizations in all 50 states and Puerto Rico, representing about 6 million member families. AFBF member families are united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being. Just as the CCA represents the interests of ranchers who must navigate land use laws in California, so does AFBF represent the interests of ranchers and farmers nationwide. AFBF consequently shares an interest in the uniform application of the "takings" doctrine, especially the "parcel as a whole" question.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While

there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. Because small business owners typically invest substantial assets into acquisition of property for their entrepreneurial endeavors—often including their personal savings—it is imperative to ensure that their property rights are guaranteed meaningful protections. As such, this case raises an important issue for NFIB Legal Center.

SUMMARY OF ARGUMENT

Amici CCA, AFBF, and NFIB concur with Petitioners that the decision of the Wisconsin Supreme Court should be reversed.

Amici agree with Petitioners' important argument that property interests are defined by state law, and that Petitioners' "Lot E" was created pursuant to Wisconsin state law. *See* Petitioners' Opening Brief, p. 28. Property interests are not created by the Constitution; "'[r]ather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). The Takings Clause "protects property rights as they are established under state law." *Stop Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 732 (2010).

Each of the Murrs' parcels was created as a separate property under Wisconsin state law. That is the starting point for the Takings Clause analysis. A parcel, once created, gives its owner the bundle of rights that is the "property" protected by the Takings Clause.

ARGUMENT

I. STATE LAW DEFINES THE "PROPERTY" PROTECTED BY THE TAKINGS CLAUSE

The central question before this Court is how the "property" for regulatory takings analysis should be identified when there are two contiguous parcels, owned in common, and the state regulation precludes all development of one parcel.

Property rights did not originate in the Constitution. The historical precedent for property rights was brought to America by its English colonists and formed the basis for American law of property: "The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium." *Hage v. United States*, 35 Fed. Cl. 147, 151 (1996). This experience imbued early Americans with a distinct identity of individual rights, particularly the capacity to own property. According to John Adams, "[t]he Framers of the Constitution, by and large, subscribed to the Lockean view of the essential nature of individual property rights. ... Property must be secured or liberty cannot exist." JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1996) (quoting 6 The Works of John Adams 280 (Charles Francis Adams ed. 1850)). In fact, the protection of private property was

a central aim of American government since its founding. As Alexander Hamilton explained at the Constitutional Convention of 1787, one "great ob[ject] of Gov[ernment] is [the] personal protection and security of Property." 1 Records of the Federal Convention of 1787, at 302 (Max Ferrand ed., 1911.)

Because property rights are specifically protected by the Constitution, even though those rights are not created by the Constitution, the courts must give substantial credence to protecting the property rights created by state common law and statutes. This Court has recognized this point in several takings cases. For example, in *Ruckelshaus v. Monsanto Co.*, this Court evaluated Monsanto's property right interests in its trade secrets. Similar to rights relating to real property, the Court noted that the "right to exclude others is central to the very definition of the property interest." 467 U.S. at 1011. In evaluating the Constitution's application to trade secret rights, the Court stated that, "we are mindful of the basic axiom that "'[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"" *Id.* (quoting *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 161).

Similarly, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, this Court expressly recognized that "[g]enerally speaking, state law defines property interests." 560 U.S. at 707 (citing *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998)). In evaluating the property rights at issue there, the Court concluded that, "[t]he Takings Clause

only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Id.* at 732. This Court has thus acknowledged the importance of defining the "property" for takings issue as the "property" created under state law.

II. EACH OF THE MURRS' PARCELS WAS CREATED AS A SEPARATE PROPERTY UNDER STATE LAW.

Turning to the issue in this case, it is important to note that it is state law that creates parcels of property, which are separated from adjoining properties by parcel lines.

For example, in California, real property is expressly controlled by California law. "Real property" is defined by the Civil Code to be coextensive with "lands, tenements and hereditaments." CAL. CIV. CODE § 14(2). It is subject to the jurisdiction of the state; California law therefore governs the acquisition, use, inheritance and transfer of California real property. CAL. CIV. CODE § 755.

In the instant case, the Murrs own two adjoining residential properties in the St. Croix Cove Subdivision. Similar to Wisconsin and many other states, California's Subdivision Map Act regulates and controls the design and improvement of all subdivisions in the state. CAL. Gov. CODE §§ 66410, *et seq.* At its most fundamental, the Subdivision Map Act provides for a large parcel of land to be lawfully broken into several smaller parcels or lots of land, each of which is considered a separate "property" under the law.

Thus, if a case like the Murrs' were to arise in California, the property owner's parcels would have been created under California state law. In the Murrs' case arising in Wisconsin, the Murrs' parcels were created under Wisconsin state law. Because each of the Murrs' parcels was created as a separate property under Wisconsin state law, each of the parcels should be considered a separate property under the Takings Clause. *See* Petitioners' Brief on the Merits, pp. 27-29; WIS. STAT. § 236.34(3) (recognizing that parcels of land in certified survey map shall be used "for all purposes," including conveyance).

The Takings Clause "protects property rights as they are established under state law." *Stop Beach Renourishment*, 560 U.S. at 732. The parcels that have been created by state law should be the starting point for Takings Clause analysis. A parcel, once created, gives its owner the bundle of rights that is the "property" protected by the Takings Clause.

CONCLUSION

The judgment of the Supreme Court of the State of Wisconsin should be reversed.

Respectfully submitted,

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